

**DECISION**

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**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548**

**FILE:** B-209858**DATE:** February 4, 1983**MATTER OF:** Big Bud Tractors, Inc.**DIGEST:**

1. Protest that RFP calling for 2-axle equipment is restrictive of competition because protester manufactures 3-axle equipment is denied, since RFP requirement was dictated by needs of contracting agency.
2. Defense Acquisition Regulation § 1-335 does not require that life-cycle cost evaluation factor be included in request for proposals.
3. DAR § 1-322.2(a)(8) contemplates that competitive RFP for multiyear procurement shall include a provision setting forth cancellation ceiling; however, since sole purpose of that provision is to permit payment to a contractor for unamortized nonrecurring costs if the contract is canceled, there is no reason to include that clause if those costs are not present in the procurement.
4. Where RFP provides for award to lowest technically acceptable proposal, RFP need not state relative weights of evaluation factors.

Big Bud Tractors, Inc. (Big Bud), protests on several grounds against request for proposals (RFP) No. DAAE07-82-R-5388 issued by the United States Army Tank-Automotive Command (Army).

Big Bud also has filed suit in the United States Claims Court seeking injunctive and declaratory relief. Big Bud Tractors, Inc. v. The United States, Action No. 650-82C. By order dated December 15, 1982, the court requested our decision on the protest.

We deny the protest.

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The RFP called for 1,047 2-axle, commercially proven scrapers and associated technical manuals and commercial literature under a multiyear procurement requiring deliveries over a 5-year period. The Army has received five proposals, one submitted by Big Bud: Each of the proposals is lower in price than Big Bud's proposal.

First, Big Bud contends that the requirement for a 2-axle scraper is restrictive of competition because Big Bud manufactures a 3-axle unit which is precluded by the RFP specifications.

A protester who objects to the specifications in an RFP bears a heavy burden. Washex Machinery Corporation, B-191224, July 20, 1978, 78-2 CPD 54. This is because the determination of the needs of the Government and the methods of accommodating such needs are primarily the responsibility of the contracting agencies of the Government. Maremont Corporation, 55 Comp. Gen. 1365 (1976), 76-2 CPD 181. We recognize that Government procurement officials who are familiar with the conditions under which supplies, equipment or services have been used in the past, and how they are to be used in the future, are generally in the best position to know the Government's actual needs and, therefore, are best able to draft appropriate specifications. Particle Data, Inc., B-179762, B-178718, May 15, 1974, 74-1 CPD 257.

While specifications must be drafted so as to maximize competition, the adoption of any specification or requirement necessarily limits competition to some extent. The question is not whether competition has been restricted, but whether it has been unduly restricted. See CompuServe, B-188990, September 9, 1977, 77-2 CPD 182. Consequently, we will not substitute our judgment for that of the contracting agency absent clear and convincing evidence that the agency's judgment is in error and that a contract awarded on the basis of the specifications would unduly restrict competition. Bowne Time Sharing, Inc., B-190038, May 9, 1978, 78-1 CPD 347. The fact that a particular competitor is unable to compete does not establish that competition as a whole is unduly restricted. See Bowne Time Sharing, Inc., supra; CompuServe, supra.

In this case, the Army's requirement for a 2-axle design is dictated by requirements for maneuverability and transportability of the equipment. The Army determined that it needs equipment that will be highly maneuverable under combat conditions and that equipment having a short length and tight turning radius will provide the needed maneuverability. Further, since the Army intends to transport the equipment on the Army's M870 flat-bed trailer, its needs are for equipment that is capable of being carried on the trailer.

Prior to the issuance of the RFP, the Army conducted an industry survey of existing equipment and concluded that only 2-axle equipment would meet its maneuverability and transportability needs. However, Big Bud contends that the need for maneuverability and transportability is not spelled out in the RFP. If that is what the Army wants, Big Bud argues the Army should use performance specifications rather than design specifications. But, even though performance specifications generally may be less likely to place undue restrictions on competition, there is no legal proscription on the use of design specifications, provided that the requirements as stated are not unduly restrictive and accurately reflect an agency's minimum needs. Educational Media Division, Inc., B-193501, March 27, 1979, 79-1 CPD 204. Although Big Bud may be correct about the absence of a maneuverability and transportability requirement in the RFP, as indicated above, the designation of the 2-axle equipment is dictated by those requirements. While any bidder that offers 2-axle equipment could not properly be rejected under the RFP if the equipment did not meet the RFP's unstated need for maneuverability and transportability, that is not germane as far as Big Bud is concerned, since its offer of 3-axle equipment in response to the RFP is not compliant with the stated requirement for 2-axle equipment. In the circumstances, the protest against the specifications being restrictive is denied.

Big Bud's second complaint is that the RFP is defective because it failed to include life-cycle cost criteria for the evaluation of offers. Big Bud argues that Defense Acquisition Regulation (DAR) § 1-335 Defense Acquisition Circular (DAC) No. 76-24, August 28, 1980, requires the inclusion of a life-cycle cost evaluation factor in the RFP.

Big Bud alleges that use of its scraper, even though the acquisition cost is high, will result in savings of approximately \$215 million when the operation and support costs that would be incurred over the 15 years' useful life (a minimum established by the RFP) are considered.

DAR § 1-335 states that "it is essential that [the operating and support] costs be considered in development and acquisition decisions in order that proper consideration can be given to those systems or equipment that will result in the lowest life-cycle cost to the Government." While this regulation requires that life-cycle cost be considered as a factor during the procurement cycle, we do not read the regulation as requiring that life-cycle cost be an evaluation factor for each award.

In this case, the Army states that it did not possess, nor did anyone else, any reliable figures with which to sustain life-cycle cost as an evaluation factor. The figures before the Army were essentially speculative and unvariable. In the case of Big Bud, the Army points out that Big Bud has not manufactured the specific model of scraper identified in its proposal. Even though the individual components of the Big Bud scraper have been commercially proven in other units, these components have never been combined in a single unit. Therefore, reliable costs are unavailable, the Army states, concerning the Big Bud unit.

Based on our interpretation of DAR § 1-335 and the record before us, we do not find the Army's decision not to include life-cycle cost as an evaluation factor to be improper. Rather, we find that the decision involved the exercise of informed judgment.

Big Bud's third contention is that the RFP is defective because it did not include a cancellation charge for the multiyear procurement. DAR § 1-322.2(c)(2) (DAC No. 76-20, September 17, 1979) provides:

\*\* \* \* In determining cancellation ceilings, the contracting officer must estimate reasonable preproduction or startup, labor learning, and other nonrecurring costs to be

incurred by an 'average' prime or subcontractor, which would be applicable to, and which normally would be amortized over, all items or services to be furnished under the multiyear requirements. \* \* \* The total estimate of the above costs must then be compared with the best estimate of the contract cost to arrive at a reasonable percentage figure. \* \* \*

Big Bud submits that there are nonrecurring initial start-up costs involved in this procurement. Big Bud specifically questions three figures found in the Army's Life Cycle Cost Assessment for the 14-18 cubic yard scrapers. These figures are \$64,000 for prior year engineering nonrecurring costs; \$34,000 for unique first year quality control costs and \$415,000 for unique first year data costs. Alternatively, Big Bud posits that if there are no nonrecurring costs then how does the Army justify the selection of the multiyear procurement method.

The Army reports that it did not include a cancellation provision that permits payment of a cancellation charge because the equipment to be purchased is a standard commercial unit which would not result in any nonrecurring costs. In regard to the \$64,000 figure referred to by Big Bud, the Army explains that this figure relates to the Army's in-house engineering costs associated with the development of the RFP. The \$34,000 figure, the Army states, concerns the costs for the first article test. This, the Army notes, is a separate line item (No. 1002AA) and as such a first year cost reimbursed in that year. The Army states that the \$415,000 figure relates to the cost estimate for data (technical manuals and commercial literature) set forth in the RFP as separate line items, which like the first article test item, are end items paid for in the first year of the contract. Consequently, since there were no unamortized nonrecurring costs, there was no need for a cancellation charge.

The purpose of a cancellation charge is to reimburse the contractor for unamortized nonrecurring costs in the event the contract is canceled. DAR § 7-104.47. However, a cancellation charge is not necessary where there are no unamortized nonrecurring costs to be reimbursed upon

cancellation. In this case, the protester has not refuted the Army's statement that no such costs are involved in this procurement; therefore, we see no reason why the contract had to contain a cancellation charge.

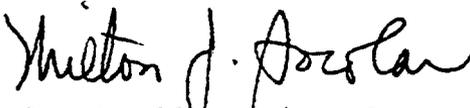
Despite the absence of a cancellation charge, we find that the Army's selection of the multiyear procurement method complied with the requirements set forth in DAR § 1-322.1(c)(3) (DAC 76-37, August 5 1982):

"Prior to the use of the multiyear contracting method in the case of items regularly manufactured and offered for sale in substantial quantities in the commercial market, the head of the contracting activity or his designee must determine that the criteria in (c)(1) are met, significant benefits or cost savings would result, and either (A) the quantities to be acquired by the Government represent a substantial portion of the total market and would require special manufacturing runs for all or substantially all of the Government's requirements, or (B) the items to be acquired require repair parts support and are not susceptible to significant changes on a periodic basis."

The Army's Determination and Finding indicates that the Army's need for the scraper is reasonably firm and continuing and the contract will produce effective competition, promote economies in performance and operation, significant cost savings will result and the item requires repair parts support and is not susceptible to significant changes. There is nothing in the record that contradicts these findings. In these circumstances, we find no legal basis to question the selection of the multiyear procurement method.

Finally, Big Bud contends that the RFP does not provide the relative weights to be used for the evaluation factors. However, the Army did not intend to use any relative weights. Paragraph M11, "Evaluation of Technical Information," indicates that technical information is only required to make sure that each offer complies with the terms and conditions of the RFP. Paragraph M02, "Evaluation

of Offers," indicates that the evaluation of offers will be based on cost. Once an offer is determined to be technically acceptable, award is to be based on cost alone. Under this evaluation scheme, there is no need to state any relative weights in the RFP.

*for*   
Comptroller General  
of the United States